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No. 01-1191

In the Supreme Court of the United States

WASHINGTON HOSPITAL CENTER AND TRAVELERS PROPERTY CASUALTY CORPORATION, PETITIONERS

v.

FLORENCE SNOWDEN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the Benefits Review Board had jurisdiction over an appeal from a supplementary compensation order under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et seq.*, finding that petitioners had failed to pay compensation in accordance with a prior compensation award and had incurred additional liability under the Act as a result.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	10
Conclusion	17

TABLE OF AUTHORITIES

Cases:

Bailey v. *Pepperidge Farm, Inc.*, Ben. Rev. Bd. No. 97-1156, 1998 WL 285563 (May 19, 1998)	7
Bowen v. *Director, OWCP*, 912 F.2d 348 (9th Cir. 1990)	6
Brandt v. *Stidham Tire Co.*, 785 F.2d 329 (D.C. Cir. 1986)	5, 16
Bray v. *Director, OWCP*, 664 F.2d 1045 (5th Cir. 1981)	14-15
Capital Cities Cable, Inc. v. *Crisp*, 467 U.S. 691 (1984)	16
Director, OWCP v. *Hamilton*, 890 F.2d 1143 (11th Cir. 1989)	6
Holliday v. *Todd Shipyards Corp.*, 654 F.2d 415 (5th Cir. 1981)	5, 6
Keener v. *Washington Metro. Area Transit Auth.*, 800 F.2d 1173 (D.C. Cir. 1986), cert denied, 480 U.S. 918 (1987)	2
Lozada v. *Director, OWCP*, 903 F.2d 168 (2d Cir. 1990)	6
Phillips v. *Marine Concrete Structures, Inc.*, 895 F.2d 1033 (5th Cir. 1990)	6, 7, 14
Providence Washington Ins. Co. v. *Director, OWCP*, 765 F.2d 1381 (9th Cir. 1985)	9, 11
Railco Multi-Constr. Co. v. *Gardner*, 902 F.2d 71 (D.C. Cir. 1990)	2

Cases—Continued: Page

Sea-Land Serv., Inc. v. *Barry*, 41 F.3d 903 (3d Cir. 1994) 11
Southeastern Maritime. Co. v. *Brown*, 121 F.3d 648 (11th Cir. 1997), cert. denied, 524 U.S. 951 (1998) 6
Tidelands Marine Serv. v. *Patterson*, 719 F.2d 126 (5th Cir. 1983) 9, 11

Statutes and regulations:

Act of May 17, 1928 (District of Columbia Workmen's Compensation Act of 1928), ch. 612, 45 Stat. 600 ..... 2, 16
Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et seq.* 2
§ 8(f), 33 U.S.C. 908(f) 4, 5, 6
§ 8(f)(1), 33 U.S.C. 908(f)(1) 4
§ 8(f)(2)(A), 33 U.S.C. 908(f)(2)(A) 4
§ 10(f), 33 U.S.C. 910(f) 4, 5, 6, 7, 8, 9, 13, 14
§ 14(f), 33 U.S.C. 914(f) 3, 7, 8, 9, 12, 16
§ 14(j), 33 U.S.C. 914(j) 7
§ 18(a), 33 U.S.C. 918(a) 3, 8, 9, 11, 12, 13, 15, 16
§ 19, 33 U.S.C. 919 2
§ 19(a), 33 U.S.C. 919(a) 2
§ 19(c), 33 U.S.C. 919(c) 2
§ 19(d), 33 U.S.C. 919(d) 3
§ 21, 33 U.S.C. 921 ..... 2, 9, 11, 12, 13, 15
§ 21(b)(3), 33 U.S.C. 921(b)(3) 3
§ 21(c), 33 U.S.C. 921(c) 3
§ 21(d), 33 U.S.C. 921(d) 3
20 C.F.R.:
Section 701.301(a)(7) 2
Section 702.315 2-3
Section 702.348 3

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 253 F.3d 725. The November 15, 1999, decision of the Benefits Review Board (Pet. App. 27a-32a) and the Board's June 30, 2000, decision denying reconsideration (Pet. App. 14a-26a) are unreported. The supplementary compensation order of the Office of Workers' Compensation Programs (Pet. App. 55a-58a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 19, 2001. A petition for rehearing was denied on August 27, 2001 (Pet. App. 59a). The petition for a writ

of certiorari was filed on November 14, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In September 1978, respondent Florence Snowden was injured while working as a psychiatric nurse for petitioner Washington Hospital Center, an employer located in the District of Columbia. Pet. App. 3a, 16a. Because the injury occurred before July 26, 1982, the Longshore and Harbor Workers' Compensation Act (LHWCA or Act), 33 U.S.C. 901 *et seq.*, as extended by the Act of May 17, 1928 (District of Columbia Workmen's Compensation Act of 1928), ch. 612, 45 Stat. 600, applies to this case.[1]

Claims for compensation under the LHWCA are administered by the Office of Workers' Compensation Programs (OWCP) of the United States Department of Labor (the Department) and are subject to the comprehensive adjudication scheme provided by Sections 19 and 21 of the Act, 33 U.S.C. 919, 921. OWCP deputy commissioners (now called district directors, see 20 C.F.R. 701.301(a)(7)) are authorized to decide compensation claims and may issue a compensation order when no hearing is required. 33 U.S.C. 919(a) and (c); 20

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[1] In 1979, the Council of the District of Columbia, pursuant to newly acquired home rule authority, passed a new workers' compensation law applicable to injuries occurring on or after its effective date, July 26, 1982. See *Railco Multi-Constr. Co.* v. *Gardner*, 902 F.2d 71, 72-74 (D.C. Cir. 1990); *Keener* v. *Washington Metro. Area Transit Auth.*, 800 F.2d 1173, 1175 (D.C. Cir. 1986), cert. denied, 480 U.S. 918 (1987). The LHWCA-based workers' compensation law, which had previously been in effect, remained effective for injuries that occurred before the effective date of the replacement Act. *Keener*, 800 F.2d at 1175. The 1982 version and the current version of the relevant provisions of the LHWCA do not differ in any material way.

C.F.R. 702.315. Where the parties are unable to reach agreement on the issues or a hearing is requested, a hearing is conducted by an administrative law judge (ALJ), who issues a decision in the form of a compensation order making an award or rejecting a claim. 33 U.S.C. 919(d); 20 C.F.R. 702.348. The Department's Benefits Review Board (the BRB or Board) is authorized to hear and determine appeals from decisions with respect to claims. 33 U.S.C. 921(b)(3). Final orders of the Board are then reviewable in the courts of appeals. 33 U.S.C. 921(c).

The LHWCA also provides for procedures governing the failure to comply with a compensation award. Section 14(f) of the Act, 33 U.S.C. 914(f), provides that if compensation payable under the terms of an award is not paid within ten days after it becomes due, the amount due is augmented by 20% (unless an order staying payment has been issued by the Board or the court of appeals). Section 18(a) of the Act, 33 U.S.C. 918(a), further provides that in case of default by the employer or his agent in the payment of an award for a period of 30 days after the award is due, the person to whom compensation is owed may apply to the district director for a supplementary order declaring the amount of the default. The person entitled to benefits may file the order in district court; the supplementary order "shall be final"; the district court "shall * * * enter judgment for the amount declared in default" by the supplementary order, so long as it is "in accordance with law"; and review of that judgment may be had "as in civil suits for damages at common law," in the court of appeals. *Ibid.*; see also 33 U.S.C. 921(d) (providing for district court enforcement of final LHWCA compensation awards).

2. After respondent's injury in 1978, petitioner Washington Hospital Center and its insurance carrier, petitioner Aetna Casualty and Surety Co. (now known as Travelers), voluntarily paid respondent for periods of temporary total disability, without a compensation award. Pet. App. 40a.[2] When a dispute arose over whether respondent was permanently and totally disabled, the matter was referred to an ALJ for a hearing in January 1992. *Id.* at 48a. In March of that year, the ALJ issued a decision holding that respondent was permanently and totally disabled as of December 1990, and ordered petitioners to pay her compensation for such disability, including periodic increases to which she was entitled under Section 10(f) of the Act, 33 U.S.C. 910(f). Pet. App. 52a. The ALJ, however, limited petitioners' liability to 104 weeks of compensation, ruling that pursuant to the Act's "second injury" provision, Section 8(f), 33 U.S.C. 908(f), the Special Fund administered by the OWCP Director should assume liability for respondent's compensation benefits after expiration of that period. Pet. App. 52a.[3]

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[2] Petitioners refer to themselves jointly as "Employer/Insurer" when describing their actions in this matter. Because of their commonality of interest, we also generally do not distinguish between the employer and insurer in this brief, but simply refer to them as "petitioners."

[3] Under Section 8(f)(1) of the Act, an employer's liability is limited to 104 weeks of compensation if the claimant has a pre-existing permanent partial disability that combines with the employee's compensable injury to render him more disabled than he would have been by the compensable injury alone. 33 U.S.C. 908(f)(1). When these conditions are met, the Special Fund, administered by the OWCP Director and funded primarily by assessments on employers and carriers, assumes responsibility for payment of compensation after 104 weeks. 33 U.S.C. 908(f)(2)(A).

Petitioners appealed the ALJ's ruling to the Benefits Review Board. Pet. App. 3a. The OWCP Director cross-appealed the imposition of Section 8(f) liability on the Special Fund. *Ibid.*

Shortly after the ALJ decision was issued, OWCP calculated the amount of benefits owed to respondent under the compensation award, including the periodic increases to which respondent was entitled under Section 10(f) of the LHWCA, 33 U.S.C. 910(f). Pet. App. 4a. Section 10(f) provides for annual adjustment of the weekly rate of compensation payable for permanent total disability (or death) by the same percentage that the national average weekly wage increased the previous year. 33 U.S.C. 910(f). Although the ALJ's opinion did not expressly state how Section 10(f) should be applied to adjust the benefits payable in this case, the D.C. Circuit had previously adopted the holding in *Holliday* v. *Todd Shipyards Corp.*, 654 F.2d 415, 417, 422 (5th Cir. 1981), that, while no Section 10(f) adjustments should be made during a claimant's period of temporary total disability, the first payment after the total disability becomes permanent (which then serves as the basis for future adjustments) should include all the adjustments that have taken effect since the time of the injury. See *Brandt* v. *Stidham Tire Co.*, 785 F.2d 329 (D.C. Cir. 1986). OWCP thus employed this "*Brandt/Holliday*" method in making the benefits calculations. Pet. App. 4a. This method stands in contrast to what OWCP views as the proper construction of Section 10(f), under which no adjustment should be made reflecting periods predating the classification of a claimant's disability as permanent total.[4]

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[4] In the context of presenting a settlement to the court of appeals in *Holliday*, counsel for the Director argued in favor of the

Petitioners thereupon paid the compensation due respondent for her first 104 weeks of compensation in accord with the OWCP calculation using the *Brandt/Holliday* methodology. Pet. App. 4a. Petitioners did not raise the Section 10(f) issue in their appeal to the Benefits Review Board, in which they challenged only the ALJ's finding of total disability. *Id.* at 4a, 40a.

In June 1994, the Board affirmed the ALJ's finding that respondent was permanently and totally disabled, but vacated and remanded the ruling that the Special Fund was liable. Pet. App. 38a-46a. Ultimately, after the remand and another appeal to the Board on the Section 8(f) "second injury" issue, the Board in December 1996 held that petitioners were not entitled to relief from full liability under Section 8(f), but were liable for the payment of all benefits. *Id.* at 33a-36a. After the Section 8(f) issue was resolved against them, petitioners reimbursed the Special Fund for the benefits the Fund had paid pursuant to the ALJ's award and

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rule adopted by the Fifth Circuit in that case. See 654 F.2d at 417, 421-422. That rule, however, was not at the time, and is not now, the Director's interpretation of the provision. The Director's position is that Section 10(f) authorizes adjustments only after a claimant's disability has become permanent for statutory purposes, and that the provision contains no "catch-up clause" that would permit including adjustments that have taken effect in the time between the date of injury and the classification of the disability as permanent total. This view has been adopted by most of the courts of appeals to consider the question, including by the Fifth Circuit in a subsequent en banc decision. See *Bowen* v. *Director, OWCP*, 912 F.2d 348 (9th Cir. 1990); *Lozada* v. *Director, OWCP*, 903 F.2d 168 (2d Cir. 1990); *Phillips* v. *Marine Concrete Structures, Inc.*, 895 F.2d 1033 (5th Cir. 1990) (en banc); but see *Director, OWCP* v. *Hamilton*, 890 F.2d 1143 (11th Cir. 1989) (per curiam) (following *Holliday* rule); *Southeastern Maritime Co.* v. *Brown*, 121 F.3d 648 (11th Cir. 1997), cert. denied, 524 U.S. 951 (1998).

commenced the payment of ongoing benefits, again making payments reflecting the *Brandt/Holliday* calculation. Pet. 11.

3. In June 1998, petitioners unilaterally decreased the periodic rate of compensation they were paying. They based that reduction on the intervening decision in *Bailey* v. *Pepperidge Farm, Inc.*, Ben. Rev. Bd. No. 97-1156, 1998 WL 285563 (May 19, 1998) (Resp. Br. in Opp. 8a-19a), in which the Benefits Review Board concluded that the D.C. Circuit, if presented with the question, would no longer follow its decision in *Brandt* because the Fifth Circuit had overruled *Holliday* (which the D.C. Circuit had followed in *Brandt*) in *Phillips* v. *Marine Concrete Structures, Inc.*, 895 F.2d 1033, 1035 (1990) (en banc). Pet. App. 4a-5a. The Board then held in *Bailey* that notwithstanding *Brandt*, a claimant in the District of Columbia is entitled to only those Section 10(f) adjustments that take effect while the claimant's disability is permanent and total. In light of *Bailey*, petitioners—in addition to unilaterally reducing periodic payments to respondent—also sought an order from OWCP authorizing them to take a credit under Section 14(j) of the Act, 33 U.S.C. 914(j), for $76,626.31 in alleged overpayments that they had made, without protest, on the basis of the *Brandt/Holliday* calculation. Pet. App. 4a-5a.

Respondent in turn sought a supplementary compensation order, under Section 14(f) of the Act, declaring the amounts withheld by petitioner—and an additional 20% of such amounts under Section 14(f)—in default. Pet. App. 5a. On October 16, 1998, OWCP issued a supplementary compensation order finding petitioner "in violation [of] the final compensation order" previously issued in the case, and requiring petitioners to pay respondent $3580.68 that was owed

pursuant to the *Brandt/Holliday* methodology from the time they reduced their payments to the time of the supplementary order, plus an additional 20% of that amount, due under Section 14(f). *Id.* at 5a, 55a-56a.

Petitioners paid the back benefits owed under the supplementary order, but not the additional 20%. Pet. App. 5a-6a. Accordingly, on January 19, 1999, OWCP issued a further order under Section 18(a) declaring petitioners in default for non-payment of the latter amount. *Id.* at 6a & n.8.

4. Petitioners appealed the supplementary compensation order to the Benefits Review Board. Relying on its decision in *Bailey*, the Board held that due process required it to decide the Section 10(f) issue because the appeal represented the employer's first opportunity to challenge the imposition of liability pursuant to *Brandt/Holliday*. Pet. App. 31a. It also repeated its conclusion in *Bailey* that the *Brandt/Holliday* rule would no longer be given controlling effect in the District of Columbia because *Brandt* had stated that it would follow *Holliday* "at least until the precedent is overruled in the Fifth Circuit," and the Fifth Circuit had since overruled *Holliday*. *Ibid.*; see also note 4, *supra*. Accordingly, the Board reversed the supplementary compensation order.

The OWCP Director filed a motion for reconsideration, arguing that the Board lacked jurisdiction over petitioners' appeal. The Board denied the motion, concluding that OWCP's supplementary compensation order was not a default order within the meaning of Section 18(a). Pet. App. 14a-25a. It reasoned that although the employer might have had notice regarding the *Brandt/Holliday* method of calculation, there was no formal determination by an ALJ or the district director before October 1998 specifying that Section

10(f) adjustments were to be calculated in accord with *Brandt/Holliday*. *Id.* at 20a. Thus, in the Board's view, the October 1998 order was an original adjudication of the *Brandt/Holliday* issue, subject to review by the Board under Section 21 of the Act. *Id.* at 21a.[5] For the same reasons given in its initial opinion, the Board also rejected the Director's argument that the Board must follow *Brandt* in the D.C. Circuit until that court overrules it. *Id.* at 22a-24a.

5. Respondent sought review of the Board's decision in the court of appeals, which vacated the Board's decision and order for lack of jurisdiction. Pet. App. 1a-13a. The court noted that, although Section 21 of the LHWCA provides the Board with general jurisdiction over appeals from decisions on claims, it nonetheless agreed with the other circuits that have addressed the issue that "actions for the enforcement of orders declaring default in the payment of [installments] due under either § 914(f) or any other substantive section of the [LHWCA] are to be brought in the district court and, only subsequent thereto, by appeal to the appropriate court of appeals." *Id.* at 11a (citing *Tidelands Marine Serv.* v. *Patterson*, 719 F.2d 126, 129 (5th Cir. 1983)); see *Providence Washington Ins. Co.* v. *Director, OWCP*, 765 F.2d 1381, 1386 (9th Cir. 1985). The court concluded that the supplementary order at issue in this case "was manifestly an order for the collection of defaulted payments" owed under the 1992 compensation order and thus fell within the scope of Section 18(a). Pet. App. 11a. "The [1998] order," the court

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[5] Although the Board concluded that it possessed jurisdiction over the October 1998 order under Section 14(f), it concluded that it lacked jurisdiction over OWCP's January 1999 order declaring default. Pet. App. 21a.

observed, "was 'plainly premised on th[e] view' that *Brandt/Holliday* applied to all awards for permanent total disability under the Act," and "on the consequent proposition that the compensation * * * calculated and declared in default was 'due under' the [1992 compensation order]." *Id.* at 11a-12a (quoting Resp. Director, OWCP, Br. 15).[6] The court ruled that the Board's characterization of the 1998 order as an "original adjudication" of the *Brandt/Holliday* issue ignored the D.C. Circuit's law at the time of the 1992 compensation order, as well as OWCP's contemporaneous understanding of the compensation rate. *Id.* at 12a.

Finally, in view of its holding that the Board lacked jurisdiction to review the supplementary compensation order, the court of appeals did not reach the merits of the controversy before the Board. It accordingly did not decide whether the Board misread the D.C. Circuit's decision in *Brandt* or whether *Brandt* should be overruled to eliminate the *Brandt/Holliday* rule in the D.C. Circuit. Pet. App. 13a & n.11.

ARGUMENT

The decision of the court of appeals, which holds that the Benefits Review Board lacked jurisdiction over the appeal of a supplementary compensation order by OWCP, declaring default on an award of LHWCA compensation, is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore unwarranted.

1. The court of appeals correctly ruled that the Benefits Review Board did not have jurisdiction over

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[6] Although the court of appeals referred to the "1992" order in the bracketed portion of the quotation in text, it is clear from the court's citation to the Director's brief that the court intended to refer to the 1998 order.

petitioners' appeal from OWCP's supplementary compensation order, which petitioners concede was an order declaring default within the meaning of Section 18(a) of the Act. Pet. i (first question presented characterizes OWCP's order as a Section 18(a) order); Pet. 5 (same characterization in argument heading). Section 18(a) is intended to provide a quick and inexpensive mechanism for the prompt enforcement of unpaid compensation awards under the LHWCA. See *Providence Washington Ins. Co.* v. *Director, OWCP*, 765 F.2d 1381, 1384 (9th Cir. 1985); *Tidelands Marine Serv.* v. *Patterson*, 719 F.2d 126, 129 (5th Cir. 1983). Thus, Section 18(a) provides that when an OWCP deputy commissioner issues a "supplementary order, declaring the amount of the default," the order may be filed in district court; the order "shall be final"; and the district court shall enter judgment for the amount the order declares in default, if it "is in accordance with law." 33 U.S.C. 918(a). The courts of appeals that have addressed the question have uniformly and properly concluded that such an order is reviewable only in accordance with that procedure for enforcement in the district court and is not subject to an appeal to the BRB under Section 21 of the Act. Pet. App. 11a; *Providence Washington Ins. Co.*, 765 F.2d at 1385-1386; *Tidelands Marine Serv.*, 719 F.2d at 129.[7]

2. Petitioners acknowledge (Pet. 6) that generally orders for the collection of defaulted payments under

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[7] In *Sea-Land Service, Inc.* v. *Barry*, 41 F.3d 903, 907 (3d Cir. 1994), the court of appeals held that if an employer pays in full the amount declared in default, thereby obviating any district court proceedings, it may challenge the determination that the amount was in default by appeal to the Benefits Review Board. Petitioners here did not pay the full amount declared past due, and they therefore do not and could not rely on *Sea-Land*.

the LHWCA are reviewable only in district court. They contend (*ibid.*), however, that when a supplementary order declaring default arises out of a dispute involving an ambiguity in the underlying compensation order, an appeal lies to the Board, at least where the ambiguity had not become apparent before the 30-day period had run for appeal to the Board of the underlying order. This exception has never been recognized by any court of appeals. Moreover, there is nothing in the terms of the LHWCA that suggests that a different jurisdictional rule should apply with respect to OWCP default orders that resolve ambiguities in the underlying compensation award. Rather, Section 18(a) makes clear that "supplementary order[s], declaring the amount of the default," are "final" and should constitute the basis for judgment in district court, if in accordance with law. 33 U.S.C. 918(a).

As the court of appeals recognized (Pet. App. 12a), petitioners' proposed rule would undermine the congressional purpose of providing a swift enforcement mechanism for default orders by subjecting some of them to the delay inherent in the multi-layered Section 21 adjudication procedure.[8] In addition, a jurisdictional test that turns on whether a supplementary compensation order resolves an ambiguity in the underlying compensation order (and whether that ambiguity should

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[8] Petitioners' proposed scheme may result in an unnecessary duplication of proceedings as well. If a supplementary order resolving an "ambiguous" underlying compensation order is ultimately attained after Section 21 review proceedings, there may still be a need for a district court proceeding to enforce compliance with the order, if the employer or carrier remains recalcitrant, as in this case where petitioners failed to pay the assessment of 20% additional compensation pursuant to Section 14(f). See Pet. App. 5a, 6a & n.8, 55a-56a; p. 8, *supra*.

have been or was discovered within the 30-day period for filing Board appeals) would undoubtedly inject uncertainty into what petitioners concede (Pet. 6) is presently an "easily administered distinction" between supplementary orders that declare default, which are reviewable exclusively in Section 18(a) proceedings in district court, and other compensation orders.

In any event, petitioners' proposed test would not support Board jurisdiction on the facts of this case. Petitioners cannot plausibly maintain that they only became aware of the interpretation accorded the ALJ's 1992 compensation order, and hence of the Section 10(f) dispute, after it was too late to obtain Board review of the compensation order under Section 21. Although they dispute whether the record indicates that they were served with an April 27, 1992, OWCP memorandum and calculation sheet showing that the Section 10(f) adjustments were being made in accord with the *Holliday* decision (see Pet. 9), it is undisputed that they paid benefits shortly after the ALJ's decision based on such calculations, thereby reflecting the understanding of all concerned that the compensation award contemplated payments in accord with *Brandt/Holliday*. See Pet. App. 12a; Pet. 10-11.

Furthermore, in this particular case, it matters little whether petitioners arrived at this understanding within or outside of the 30-day period for appealing the ALJ's decision, because they did in fact file an appeal from that decision and had an opportunity to raise the Section 10(f) issue during the course of their appeal of the ALJ's finding of respondent's disability.[9] But, in

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[9] The argument accepted by the Board in *Bailey* v. *Pepperidge Farm, Inc.*—that *Brandt* no longer applied by its own terms once the Fifth Circuit overruled *Holliday* in its *Phillips* decision (see p.

fact, petitioners challenged the Section 10(f) calculation only much later, not because they found the terms of the 1992 order ambiguous, but because they wished to obtain a modification of those terms based on the Board's 1998 decision in *Bailey* holding that *Brandt* is no longer prevailing law in the D.C. Circuit. Pet. App. 12a.[10] Thus, even if the general rule of exclusive district court jurisdiction over LHWCA default orders were subject to an exception for late-emerging disputes regarding latent ambiguities in the underlying compensation order, such an exception would not apply here. This accordingly is not an appropriate case in which to consider whether such an exception exists.

3. Petitioners do not assert that there is a conflict in the circuits on the question whether the Board lacked jurisdiction over the appeal of the order in this case. To the extent the petition's references to the Fifth Circuit's decision in *Bray* v. *Director, OWCP*, 664 F.2d

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7, *supra*)—could have been made any time after 1990, when *Phillips* was decided en banc, and thus was available to petitioners in their 1992 appeal of the compensation order.

[10] Petitioners contend (Pet. 12) that the court of appeals erred in suggesting that they reduced respondent's benefits level in response to the Board's decision in *Bailey* and that the controversy arose in 1997, well before *Bailey* was decided. The court of appeals' characterization, however, is supported by petitioners' statement of facts in their brief to the court of appeals (Br. 5), which noted that petitioners resumed paying ongoing benefits after the Board's 1996 decision in this case and then stated:

> In 1998, when notified of the annual increase in benefits, [petitioners] objected to the calculation. [Petitioners] argued that pursuant to the BRB decision in *Bailey* * * *, cost of living adjustments are calculated from the date of the onset of permanency, not the first date of any temporary total disability.

1045 (1981), implicitly assert the existence of a conflict, there is no merit to the assertion.

In *Bray*, the court held that a Section 18(a) proceeding was the appropriate means for resolving the question whether there has been a default in payments due under an original award when such a question does not emerge until after the expiration of the 30-day period for appeal of the award. 664 F.2d at 1047. It further held, however, that because the deputy commissioner's supplementary order in that case had determined that there was *not* a default, there was no possibility of presenting that order to a district court with authority under Section 18(a) to determine whether it was "in accordance with law," as there is when such an order finds that there *has* been a default (and identifies its amount). In those circumstances, the court in *Bray* concluded that the general review provisions of Section 21 applied, giving the Board jurisdiction. *Id.* at 1048; see *ibid.* (defining issue before court as "whether an error of fact or law in a supplementary order finding *no default* is reviewable before the Benefits Review Board") (emphasis added). Thus, *Bray* does not provide support for the proposition that a supplementary order, like the one here, that finds there *has* been a default, may be reviewed in a manner other than through the Section 18(a) district court enforcement procedure.

4. There is no compelling reason for the Court to grant review in this case despite the absence of a circuit conflict. In fact, petitioners emphasize that their case is uncommon and unusual. Pet. 8, 10. Review of a ruling of the D.C. Circuit on this question is particularly unnecessary because, as the court of appeals explained, "[t]his case is one of the last claims likely to be brought by a District of Columbia employee under the

[LHWCA]," as extended by the Act of May 17, 1928 (District of Columbia Workmen's Compensation Act of 1928), Pet. App. 2a & n.1, and very few claims arise in that Circuit under the general jurisdictional provision of the LHWCA. See *Brandt* v. *Stidham Tire Co.*, 785 F.2d 329, 332 (D.C. Cir. 1986) (noting that the circuit "is about to have a diminished role as a reviewer of BRB decisions under the LHWCA" in light of the local District of Columbia compensation law).

Furthermore, the jurisdictional rule adopted by the court of appeals clearly does not leave employers or carriers without a forum for raising challenges to supplementary compensation orders. Petitioners here may raise arguments in district court that the supplementary compensation order is not in accordance with law, in the likely event that a Section 18(a) enforcement proceeding is brought by respondent to collect the additional compensation declared due under Section 14(f). For all of these reasons, this Court's review is not warranted.[11]

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[11] In the question presented, the petition appears also to seek review of the correctness of the *Brandt/Holliday* rule. See Pet. i. The body of the petition, however, clarifies that petitioners are not seeking certiorari on that issue, but rather are only seeking review and reversal of the court of appeals' jurisdictional ruling, to be followed by a remand of the case to the court of appeals for consideration of the substantive issue. See Pet. 16.

In any event, the court of appeals expressly did not consider or rule on the *Brandt/Holliday* issue. A grant of certiorari on that question therefore would not be warranted. See *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 697 (1984) ("we do not ordinarily consider questions not specifically passed upon by the lower court").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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